DOCKET NO. UWY CV-20-6054309-S

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, *et al.*, *Plaintiffs,*	:	SUPERIOR COURT
v.	:	JUDICIAL DISTRICT OF WATERBURY AT WATERBURY
LAMONT, NED, *et al*., *Defendants.*	:	APRIL 14, 2020

APPLICATION OF NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU FOR PERMISSION TO FILE A BRIEF *AMICUS CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Pursuant to the general supervisory powers of the Superior Court, New England Health Care Employees Union, District 1199, SEIU applies for permission to file a brief *amicus curiae*, attached as Exhibit A, in opposition to Defendants' motion to dismiss, DE #112.

I. HISTORY AND BRIEF STATEMENT OF THE CASE

This is a mandamus action brought by Plaintiffs, individuals who are incarcerated at Connecticut Department of Correction ("DOC") facilities and an association of lawyers who represent them, seeking injunctive relief to protect people who are incarcerated from the developing COVID-19 pandemic by, *inter alia*, immediately reducing the Connecticut prison and jail population. DE ##101, 114, 115. Defendants objected to temporary relief, DE #106, and moved to dismiss, DE ##112, 113.

II. SPECIFIC FACTS RELIED UPON

Nature of Applicant's Interest. Applicant New England Health Care Employees Union, District 1199, SEIU ("District 1199"), is a labor organization that represents more than 26,000 health care workers across the public and private sectors in Connecticut, including 7,000 members who work for the State of Connecticut as health care workers at state agencies.

Relevant to this case, District 1199 is the exclusive representative of approximately 600 frontline health care workers in the DOC, including doctors, nurses, psychiatrists, social workers, and other health care professionals in Connecticut's jails and prisons.

Reasons Why Applicant Should Be Allowed to File an Amicus Brief. Because many of District 1199's members work in Connecticut's correctional facilities, applicant shares a direct stake in the outcome of this litigation and its implications for the health and safety of correctional staff, patients within their care, and the public at large. District 1199 believes that highlighting its specialized knowledge of chronic understaffing and limited medical resources in Connecticut's correctional facilities, in particular, will assist the Court's resolution of this case.

III. LEGAL GROUNDS ON WHICH APPLICANT RELIES

The Connecticut Supreme Court has endorsed the practice of a nonparty obtaining the Superior Court's permission to file a brief *amicus curiae*. *Thalheim v. Greenwich*, 256 Conn. 628, 646 (2001). "Participation of amicus curiae is normally appropriate . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." 4 Am. Jr. 2d, *Amicus Curiae* § 3 (2018); *Hard Drive Prods., Inc. v. Does 1-1,495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012). Where, as here, a case involves "questions of public interest[,] the leave is generally granted to appear as amicus curiae." 4 Am. Jr. 2d, *Amicus Curiae* § 3 (2018); *Empire State Assoc. of Assisted Living, Inc. v. Daines*, 887 N.Y.S.2d 452, 456, 26 Misc.3d 340, 343 (Sup. Ct. 2009).

Plaintiffs consent to the filing of a brief; defendants have been consulted, and take no position on the application to file the brief.

IV. PROPOSED BRIEFING SCHEDULE

In recognition of the extraordinary circumstances presented by this case and tomorrow's oral argument, applicant respectfully requests that its application be granted and it be permitted to file the brief, attached as Exhibit A, immediately.

Respectfully Submitted,

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU, APPLICANT

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CERTIFICATION:

This is to certify that a copy of the foregoing, and attached exhibit, has been emailed, on this 14th day of April, 2020, to:

- Attorney General William Tong, c/o Assistant Attorney General James M. Belforti, 55 Elm Street, Hartford, CT 06141;
- Dan Barrett, Elana Bildner, ACLU Foundation of Connecticut, 765 Asylum Avenue, Hartford, CT 06105; and
- Hope Metcalf, Marisol Orihuela, Miriam Gohara, Yale Law School, 127 Wall Street, New Haven, CT 06511.

/s/
Alexander Tiva Taubes

Exhibit A

(Proposed Brief of Amicus Curiae)

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BRIEF OF *AMICUS CURIAE*
NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION & STATEMENT OF INTEREST[1]

New England Health Care Employees Union, District 1199, SEIU ("District 1199") represents frontline doctors, nurses, and other health care workers employed by the Connecticut Department of Correction ("DOC") at prisons and jails statewide. The COVID-19 pandemic presents an unprecedented health risk to people who are incarcerated and to the staff who are responsible for their care. Plaintiffs, people who are incarcerated and a group of lawyers who represent them, allege that Connecticut's failure to reduce its prison and jail population puts people who are incarcerated at an illegal and unconstitutional high risk of illness or death from the pandemic. Defendants argue that the case is nonjusticiable, that they are immune from suit, and that Plaintiffs' claim is "too speculative." DE #113. But "a remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (plaintiff stated Eighth Amendment claim for future harm due to second-hand smoke exposure). District 1199 therefore respectfully submits this brief in opposition to Defendants' motion to dismiss.

[1] Counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

II. FACTUAL BACKGROUND

A. Even Before COVID-19, DOC Lacked Adequate Staff & Resources

For years, DOC has struggled to recruit and retain adequate medical frontline staff, leading to chronic staffing shortages and unsafe conditions at DOC facilities. As Plaintiffs allege, in 2019, DOC had only 309 nurses and 23 medical providers (including MDs, DOs, APRNs, and PAs) on its staff serving more than 13,000 incarcerated patients. *See* DE #114 at 14.

In February of this year, District 1199 members testified before legislators about continuing inadequate resources and staff for DOC health care.[2] District 1199 members testified, *inter alia*, that more than 80 health care staff had left the agency since 2018; that there were approximately 140 vacant DOC staff positions statewide; that members were frequently being forced to work under protest; that workers were required to triage crises rather than act proactively; and that staffing levels were below minimum levels aimed at protecting patient safety. *Id.* As Plaintiffs allege in their Complaint, DE #114 at 15, Defendant Cook admitted to 139 out of 843 budgeted DOC medical positions being vacant in a meeting with legislators.

Just this month, Defendant Cook entered a settlement agreement with a class of people in DOC custody threatened by another highly contagious and potentially lethal virus—Hepatitis C. *Barfield v. Cook*, 3:18-cv-1198 (MPS)(SALM), ECF No. 106-1 (Apr. 1, 2020). Although the settlement is not an admission of liability, notably, the settlement subjects DOC to court review, monitoring, and dispute resolution procedures regarding Hepatitis C screening, testing, and treatment within DOC facilities, *id.* at 3-5.

[2] Testimony of District 1199 members before the General Assembly's Joint Appropriations Committee on February 11, 2020, *available at* https://www.cga.ct.gov/asp/menu/CommDocTmy.asp?comm_code=app&date=02/11/2020.

B. Without Drastic Action, COVID-19 Will Overwhelm DOC

As Plaintiffs allege, DOC medical staff are concerned about the effect of the COVID-19 pandemic on already inadequate staffing levels at their facilities. DE #114 at 16. Adding to their concern, staff lack the protective equipment and supplies needed to protect themselves, their patients, and the communities where they return to after their shifts. Medical staff lack N95 masks for consistent use caring for patients who need emergency dental procedures or who are suspected or confirmed to be infected with COVID-19. Plaintiffs allege that staff even lack surgical masks and gloves while in close contact with persons who have been potentially exposed to COVID-19. DE #114 at 17-18.

Additionally, as Plaintiffs highlight, DOC planning for the pandemic has been woefully inadequate and entirely reactive. DE #114 at 17-20. Some social distancing protocols, allowing large gatherings of people who are incarcerated, are less stringent than rules for the general public, *id.* at ¶ 74; sanitation practices are insufficient to minimize the risk of infection, ¶ 75; and even where quarantining is made possible within facilities, ventilation is poor, ¶ 84. Meanwhile, COVID-19 is already present in Connecticut jails and prisons, and quickly growing. *Id.* at ¶ 55.

C. Defendants Fail to Respond Adequately to COVID-19's Threat to DOC

Defendants have taken strong steps to limit the effect of the COVID-19 pandemic on the general public—declaring a dual emergency of public health and emergency preparedness until September 2020, ¶ 18; closing schools, malls, and gyms, ¶ 26; postponing the state's presidential primary, *id.*; and suspending certain court operations, ¶ 27. But while Defendant Lamont has shown great concern for the general public and businesses of the state, the interventions he and Defendant Cook have issued do not adequately protect the people in their custody and the frontline staff entrusted with the responsibility of their care. ¶ 28. Defendants continue to fail to

take proactive measures to reduce prison and jail populations, *id.* at ¶¶ 87-92. As a result, thousands of people who are currently incarcerated are parole-eligible, incarcerated for technical violations of parole or probation, within months of their sentence end, are being held on a low bond they cannot pay, or are elderly or otherwise medically vulnerable to COVID-19, ¶¶ 37-42.

Connecticut's failure to act stands in stark contrast to other jurisdictions nationwide, which have successfully reduced prison and jail populations to stem the spread of COVID-19, *id.* at pp. 13-14, ¶ 57. New Jersey created an immediate presumption of release for every person serving a sentence in county jail; Maine canceled all warrants for failure to appear and paying fees; Kentucky is commuting the sentences of more than 1,000 state prisoners; and the federal system is substantially increasing the use of home confinement to encourage release, *id.*

The number of people in Connecticut's prisons and jails, however, remains materially unchanged since the outbreak of the COVID-19 pandemic, *id.* at ¶¶ 28-30, even though correctional facilities are close quarters where it is often impossible to maintain the recommended social distancing guidelines, unless drastic measures are taken to reduce the population. *Id.* at ¶¶ 85-86.

III. LEGAL STANDARD

The legal standard governing motions to dismiss for lack of subject matter jurisdiction is well-settled:

> When a court decides a jurisdictional question raised by a pretrial motion to dismiss, it must . . . take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged.

Cuozzo v. Town of Orange, 315 Conn. 606, 614 (2015) (ellipses omitted). In this case, Defendants submitted no proof with their motion to dismiss. *See* DE ##112, 113. "If, . . . the

defendant submits . . . no proof to rebut the plaintiff's jurisdictional allegations . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein . . . ." *Cuozzo*, 315 Conn. at 616.

IV. ARGUMENT

Defendants argue that Plaintiffs lack standing, DE #113 at 4-22, that this case presents a nonjusticiable political question, *id.* at 22-27, and that this case is barred by either sovereign immunity or Eleventh Amendment immunity, *id.* at 27-29. Defendants' arguments conflate Plaintiffs' claims and potential remedies for those claims. Plaintiffs claim Defendants' violation of the Eighth and Fourteenth Amendments to the U.S. Constitution and the General Statutes. If proven, potential remedies for the claims include court-ordered furloughs, home detention, release of certain people who are incarcerated, the provision of temporary housing, or garden variety court monitoring of compliance with court-ordered standards. Because Plaintiffs seek to prevent the imminent violation of statutory and constitutional rights and infliction of serious injury or death, claims over which this Court has jurisdiction, all of Defendants' jurisdictional arguments are meritless and this Court should proceed to resolve the claims on the merits.

A. Plaintiffs Have Standing

Defendants' argument that Plaintiffs lack standing because they "have no right to be released early," DE #113 at 16-17, is a red herring. Plaintiffs seek no "right to be released early," they seek to vindicate their statutory and constitutional rights to adequate sanitation and medical care guaranteed by statute and the constitution. It is well-established that people who are incarcerated may go to court to vindicate those rights, even though release may be a potential remedy for their violation:

> A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society. If government fails to fulfill this obligation, the courts have a responsibility to remedy [it]. . . . When necessary to ensure compliance with a constitutional mandate, courts may enter orders placing limits on a prison's population.

Brown v. Plata, 563 U.S. 493, 510-11 (2011) (affirming structural injunction entered by federal district court to limit prison overcrowding in California, even though it resulted in the release of people who were incarcerated).

Defendants complain that "plaintiffs cannot claim an injury in not being released early, otherwise any inmate could get past the standing test simply by virtue of his incarceration." DE #113 at 17. But Plaintiffs seek protection from the COVID-19 pandemic. That is more than simply "an injury in not being released early." On the flip side, if Defendants' argument was correct, people who are incarcerated would *never* have standing to challenge prison practices, policies, or conditions that threaten their constitutional rights or endanger their lives, so long as a potential remedy involved "being released early." That cannot be the case because in Connecticut, "[s]tanding is not a technical rule intended to keep aggrieved parties out of court." *Conn. Assn. of Health Care Facilities, Inc. v. Worrell*, 199 Conn 609, 612-13 (1986) (holding that two state health care associations had standing to bring declaratory judgment actions against commissioner of mental health on behalf of their member health care facilities).

Where, as here, "the nexus between the injury and the claim sought to be adjudicated is obvious and direct, a plaintiff has standing to maintain the claim." *Id.* at 613. The connection between the incarcerated Plaintiffs' alleged injury, risk of serious illness or death from COVID-19, and the claim—that Defendants' current policy constitutes deliberate indifference to that risk, in violation of their statutory and constitutional duties—could hardly be more obvious or direct.

Defendants' argument that CCDLA, the organizational Plaintiff, lacks standing because it "makes no allegations about any individual clients of its members," DE #113 at 13, is remarkably similar to an argument the Connecticut Supreme Court rejected in *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 327 Conn. 650, 693 (2018) (holding that the coalition including parents of children in Connecticut public schools had associational standing to assert constitutional claim of educational inadequacy), omitted from Defendants' memorandum. In that case, "the defendants contend[ed] that a court cannot determine whether individual members of the Coalition have been denied their constitutional right[s] . . . without specific evidence as to those individuals." *Id.* The Court disagreed and upheld the organization's standing, although it ultimately rejected the merits of the organization's claims. *Id.*

Defendants' argument that Plaintiffs' alleged injuries are "too speculative," DE #113 at 17-21, to confer standing is meritless. The Supreme Court has held that "the Eighth Amendment protects against future harms to inmates" and a "remedy for unsafe conditions need not await a tragic event." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). The threat of future harm from second-hand smoke in that case seems pedestrian in comparison to the imminent devastating threat that the COVID-19 pandemic poses to Connecticut's correctional facilities. As Plaintiffs allege in their complaint – and which must be accepted as true at this stage in the litigation, *Cuozzo*, *supra* – the COVID-19 pandemic poses a high risk of imminent serious injury or death to thousands of individuals in DOC custody. DE #114 at 4-21. Plaintiffs have sufficiently alleged that Defendants have provided a deficient response to the pandemic on a systemic basis that jeopardizes the ongoing well-being of Plaintiffs and other people who are incarcerated by Defendants. *Id.* at 16-21. These allegations more than suffice to confer standing on both the individual and organizational Plaintiffs to prosecute the instant claims.

B. Plaintiffs' Claims Are Justiciable

Defendants say this case presents a nonjusticiable political question because it is about "whether, when, and under what circumstances to release inmates." DE #113 at 22-27. Again, however, Defendants conflate Plaintiffs' claim with potential remedies if Plaintiffs' claim is vindicated. This case concerns whether Defendants' practices violate Plaintiffs' and other incarcerated persons' statutory and constitutional rights, warranting mandamus relief.

To be sure, if Defendants' policies and practices are found to violate the Constitution, "whether, when, and under what circumstances to release inmates" may need to be considered as part of the remedy. And the Supreme Court of the United States has explained, "[e]stablishing the population at which the State could begin to provide constitutionally adequate medical and mental health care, and the appropriate timeframe within which to achieve the necessary reduction, requires a degree of judgment." *Brown*, *supra*, 563 U.S. at 538. But "[c]ourts have substantial flexibility when making these judgments. . . . for breadth and flexibility are inherent in equitable remedies." *Id*. While "courts must not confuse professional standards with constitutional requirements," *id.* at 539-540, "expert opinion may be relevant when determining what is obtainable and what is acceptable . . . . [and] [w]hen . . . addressed to the question of how to remedy the relevant constitutional violations," *id.* at 540. Whatever the difficulty, though, "[c]ourts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration." *Id.* at 511.

This case is therefore no less justiciable than any other case claiming Eighth and Fourteenth Amendment violations because of inadequate medical care and sanitation. Indeed, although Defendants reference the six factors relevant to the justiciability analysis, DE #113 at 22-23, they omit the principle that "[u]nless one of these [factors] is *inextricable* from the case at

bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 295 Conn. 240, 255–56 (2010) (emphasis added). "Indeed, the principle that a case should not be dismissed for nonjusticiability as a political question unless [a factor] is inextricable from the case, means that courts should view such cases with a heavy thumb on the side of justiciability," *id.* at 256 (internal quotation marks and citation omitted), as "[c]onsiderations of justiciability must be balanced against the principle that every presumption is to be indulged in favor of subject matter jurisdiction," *id.* at 258. "[S]imply because the case is connected to the political sphere, it does not necessarily follow that it is a political question." *Id.* at 256.

C. Defendants Have No Immunity from Suit

Defendants next argue they are immune from suit. DE #113 at 27-29. Not so. Connecticut's ancient common law sovereign immunity has evolved and adapted with the times. "The source of the sovereign power of the state is now the constitution which created it. In a constitutional democracy sovereign immunity must relax its bar when suits against the government complain of unconstitutional acts." *Setner v. Bd. of Trustees*, 184 Conn. 339, 343 (1981) (citing *Horton v. Meskill*, 172 Conn. 615, 623 (1977) & *Simmons v. Parizek*, 158 Conn. 304, 306-07 (1969)). "Sovereign immunity does not bar suits against state officials acting in excess of their statutory authority or pursuant to an unconstitutional statute . . . [or] seeking only to enjoin state officers from illegal or unconstitutional acts." *Doe v. Heintz*, 204 Conn. 17, 31 (1987). Because this case challenges allegedly illegal and unconstitutional action, Defendants' sovereign immunity argument based on the common law, DE #113 at 27-28, is meritless.

Defendants' Eleventh Amendment argument, DE #113 at 28-29, is also meritless, ignoring over one hundred years of black-letter federal law. Under the *Ex parte Young* doctrine,

Eleventh Amendment immunity fails to apply where a complaint "alleges an ongoing violation of federal law and . . . seeks relief properly characterized as prospective." *Nat'l Ass'n for Advancement of Colored People v. Merrill*, 939 F.3d 470, 475 (2d Cir. 2019) (rejecting, *inter alia*, Defendant Lamont's argument for Eleventh Amendment immunity in case seeking prospective injunctive relief). That Plaintiffs seek prospective relief to protect them from serious constitutional violations is enough to dispense with Defendants' Eleventh Amendment argument. *Id.* To be sure, it is true that rectifying the constitutional violation very well may require an expenditure of state funds. But it is well-settled that for purposes of the *Ex parte Young* exception, "sovereign immunity is not invoked because prospective injunctive relief ultimately results in a diminution of state funds." *In re Dairy Mart Convenience Stores*, 411 F.3d 367, 375 (2d Cir. 2005).[3] Thus, Eleventh Amendment immunity has no application here.

IV. CONCLUSION

District 1199's frontline health care workers have a vital interest in flattening the curve of the COVID-19 outbreak currently already underway in DOC facilities, which will require drastic measures far beyond Defendants' current policies. Reducing the population of persons who are incarcerated will decrease the rate of COVID-19 spread within DOC facilities, ease the burden on and protect frontline staff, and therefore safeguard public health and safety during a time of unprecedented public health risk. Defendants' motion to dismiss lacks merit because this Court has jurisdiction to hear Plaintiffs' claims. District 1199 therefore files this brief in support of Plaintiffs, and urges this Court to deny the motion to dismiss.

[3] "Departure from Second Circuit precedent on issues of federal law . . . should be constrained in order to prevent the plaintiff's decision to file an action in federal District Court rather than a state court located 'a few blocks away' from having the 'bizarre' consequence of being outcome determinative." *Szewczyk v. Department of Social Services*, 275 Conn. 464, 475-77 n.11 (2005).

Respectfully Submitted,

NEW ENGLAND HEALTH CARE EMPLOYEES UNION, DISTRICT 1199, SEIU

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